

IN THE
SUPREME COURT OF INDIANA

CASE NUMBER:

ORDER AMENDING RULES OF TRIAL PROCEDURE

Under the authority vested in this court to provide by rule for the procedure employed in all courts of this state and this Court's inherent authority to supervise the administration of all courts of this state, Rules 5, 34, 43, 44 and 79 of the Indiana Rules of Trial Procedure are amended to read as follows (deletions shown by ~~striking~~ and new text shown by underlining):

RULES OF TRIAL PROCEDURE

Rule 5. Service and Filing of Pleading and Other Papers

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(C) Certificate of Service. An attorney or unrepresented party tendering a document to the Clerk for filing shall certify that service has been made, list the parties served, and specify the date and means of service. The certificate of service shall be placed at the end of the document and shall not be separately filed. The separate filing of a certificate of service, however, shall not be grounds for rejecting a document for filing. The Clerk may permit documents to be filed without a certificate of service but shall require prompt filing of a separate certificate of service.

~~(C)~~ **(D) Same: Numerous defendants.** In any action in which there are unusually large numbers of defendants, the court, upon motion or of its own initiative, may order:

(1) that service of the pleadings of the defendants and replies thereto need not be made as between the defendants;

(2) that any cross-claim, counterclaim, or matter constituting an avoidance or affirmative defense contained therein shall be deemed to be denied or avoided by all other parties; and

(3) that the filing of any such pleading and service thereof upon the plaintiff constitutes due notice of it to the parties.

A copy of every such order shall be served upon the parties in such manner and form as the court directs.

~~(D)~~ **(E) Filing.**

(1) Except as otherwise provided in subparagraph (2) hereof, all pleadings and papers subsequent to the complaint which are required to be served upon a party shall be filed with the Court either before service or within a reasonable period of time thereafter.

(2) No deposition or request for discovery or response thereto under Trial Rules 27, 30, 31, 33, 34 or 36 shall be filed with the Court unless:

(a) A motion is filed pursuant to Trial Rule 26(C) or Trial Rule 37 and the original deposition or request for discovery or response thereto is necessary to enable the Court to rule; or

(b) A party desires to use the deposition or request for discovery or response thereto for evidentiary purposes at trial or in connection with a motion, and the Court, either upon its own motion or that of any party, or as a part of any pre-trial order, orders the filing of the original.

(3) Custody of original and Period of Retention:

(a) The original of a deposition shall, subject to the provisions of Trial Rule 30(E), be delivered by the reporter to the party taking it and shall be maintained by that party until filed with the Court pursuant to paragraph (2) or until the later of final judgment, agreed settlement of the litigation or all appellate rights have been exhausted.

(b) The original or any request for discovery or response thereto under Trial Rules 27, 30, 31, 33, 34 and 36 shall be maintained by the party originating the request or response until filed with the Court pursuant to paragraph (2) or until the later of final judgment, agreed settlement or all appellate rights have been exhausted.

(4) In the event it is made to appear to the satisfaction of the Court that the original of a deposition or request for discovery or response thereto cannot be filed with the Court when required, the Court may allow use of a copy instead of the original.

(5) The filing of any deposition shall constitute publication.

~~(E)~~ **(F) Filing with the court defined.** The filing of pleadings, motions, and other papers with the court as required by these rules shall be made by one of the following methods:

(1) Delivery to the clerk of the court;

(2) Sending by electronic transmission under the procedure adopted pursuant to Administrative Rule 12;

(3) Mailing to the clerk by registered, certified or express mail, return receipt requested;

(4) Depositing with any third-party commercial carrier for delivery to the clerk within three (3) calendar days, cost prepaid, properly addressed; or

(5) If the court so permits, filing with the judge, in which event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.

Filing by registered or certified mail and by third-party commercial carrier shall be complete upon mailing or deposit.

Any party filing any paper by any method other than personal delivery to the clerk shall retain proof of filing.

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Rule 34. Production of documents and things and entry upon land for inspection and other purposes

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(C) Application to Non-parties-:

- (1) A witness or person other than a party may be requested to produce or permit the matters allowed by subsection (A) of this rule. Such request shall be served upon other parties and included in or with a subpoena served upon such witness or person.
- (2) Neither a request nor subpoena to produce or permit as permitted by this rule shall be served upon a non-party until at least fifteen (15) days after the date on which the party intending to serve such request or subpoena serves a copy of the proposed request and subpoena on all other parties. Provided, however, that if such request or subpoena relates to a matter set for hearing ~~with~~ within such fifteen (15) day period or arises out of a *bona fide* emergency, such request or subpoena may be served upon a non-party one (1) day after receipt of the proposed request or subpoena by all other parties.
- (3) The request shall contain the matter provided in subsection (B) of this rule. It shall also state that the witness or person to whom it is directed is entitled to security against damages or payment of damages resulting from such request and may respond to such request by submitting to its terms, by proposing different terms, by objecting specifically or generally to the request by serving a written response to the party making the request within thirty (30) days, or by moving to quash as permitted by Rule 45(B). Any party, or any witness or person upon whom the request properly is made, may respond to the request as provided in subsection (B) of this rule. If the response of the witness or person to whom it is directed is unfavorable, if he moves to quash, if he refuses to cooperate after responding or fails to respond, or if he objects, the party making the request may move for an order under Rule 37(A) with respect to any such response or objection. In granting an order under this subsection and Rule 37(A)(2) the court shall condition relief upon the prepayment of damages to be proximately incurred by the witness or person to whom the request is directed or require an adequate surety bond or other indemnity conditioned against such

damages. Such damages shall include reasonable attorneys' fees incurred in reasonable resistance and in establishing such threatened damage or damages.

- (4) A party receiving documents from a non-party pursuant to this provision shall serve copies on all other parties within fifteen (15) days of receiving the documents. If the documents are voluminous and service of a complete set of copies is burdensome, the receiving party shall notify all parties within fifteen (15) days of receiving the documents that the documents are available for inspection at the location of their production by the non-party, or at another location agreed to by the parties. The parties shall agree to arrangements for copying, and any party desiring copies shall bear the cost of reproducing them.

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Rule 43. Evidence

(A) Form and admissibility. In all trials the testimony of witnesses shall be taken orally in open court, unless state law, these rules, the Indiana Rules of Evidence, or other rules adopted by the Indiana Supreme Court provide otherwise, provided by these rules. ~~All evidence shall be admitted which is admissible under the statutes of the state of Indiana, under these rules or under the rules of evidence heretofore applied in the courts of the state of Indiana. In any case, the statute or rule which favors the reception of the evidence governs and the evidence shall be presented according to the most convenient method prescribed in any of the statutes or rules to which reference is herein made. The competency of a witness to testify shall be determined in like manner.~~

~~**(B) Scope of examination and cross examination.** A party may interrogate any unwilling or hostile witness by leading questions. A party may call an adverse party or an officer, director, managing agent or executive officer, or other person duly authorized and consenting to testify on its behalf, of a public or private corporation or of a partnership or association which is an adverse party, and interrogate him by leading questions and contradict and impeach him in all respects as if he had been called by the adverse party, and the witness thus called may be contradicted and impeached by or on behalf of the adverse party also, and may be cross examined by the adverse party only upon the subject matter of his examination in chief.~~

~~**(C) Record of excluded evidence.** In an action tried by a jury, if an objection to a question propounded to a witness is sustained by the court, the examining attorney may make a specific offer of what he expects to prove by the answer of the witness. The court may require the offer to be made out of the hearing of the jury. The court may add such other or further statement as clearly shows the character of the evidence, the form in which it was offered, the objection made, and the ruling thereon. An offer to prove may be made without questions if the court indicates that any or further testimony of the witness with respect to the offered proof will not be allowed or if neither the judge nor the opposing party so request. In actions tried without a jury the same procedure may be followed, except that the court upon request shall take and report the evidence in full, unless it clearly appears that the evidence is not admissible on any ground or that the witness is privileged.~~

~~(D) Affirmation in lieu of oath.~~ Whenever under these rules or under any statute an oath is required to be taken, a solemn affirmation may be accepted in lieu thereof.

~~(E)~~ **(B) Evidence on motions.** When a motion is based on facts not appearing of record the court may hear the matter on affidavits presented by the respective parties, but the court may direct that the matter be heard wholly or partly on oral testimony or depositions.

~~(F)~~ **(C) Interpreters.** The court may appoint an interpreter of its own selection and may fix his reasonable compensation. The compensation shall be paid out of funds provided by law or by one or more of the parties as the court may direct, and may be taxed ultimately as costs, in the discretion of the court. Application of this rule shall be in compliance with the Americans with Disabilities Act.

~~(G)~~ **(D) How evidence is presented.** The trial shall proceed in the following order, unless the court within its discretion, otherwise directs: First, the party upon whom rests the burden of the issues may briefly state his case and the evidence by which he expects to sustain it. Second, the adverse party may then briefly state his defense and the evidence he expects to offer in support of it. Third, the party on whom rests the burden of the issues must first produce his evidence thereon; the adverse party will then produce his evidence which may then be rebutted.

Rule 44. Proof of official record

~~(A) Authentication.~~ The rules concerning proof of official records are governed by the Rules of Evidence.

~~(1) Domestic.~~ An official record kept within the United States, or any state, district, commonwealth, territory, or insular possession thereof, or within the Panama Canal Zone, the Trust Territory of the Pacific Islands, or the Ryukyu Islands, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof or by a copy attested by the officer having the legal custody of the record, or by his deputy. Such publication or copy need not be accompanied by proof that such officer has the custody. Proof that such officer does or does not have custody of the record may be made by the certificate of a judge of a court of record of the district or political subdivision in which the record is kept, authenticated by the seal of the court, or may be made by any public officer having a seal of office and having official duties in the district or political subdivision in which the record is kept, authenticated by the seal of his office.

~~(2) Foreign.~~ A foreign official record, or an entry therein, when admissible for any purpose, may be evidenced by an official publication thereof; or a copy thereof, attested by a person authorized to make the attestation, and accompanied by a final certification as to the genuineness of the signature and official position:

- ~~(a) of the attesting person; or~~
- ~~(b) of any foreign official whose certificate of genuineness of signature and official position relates to the attestation or is in a chain of certificates of genuineness of signature and official position relating to the attestation.~~

~~A final certification may be made by a secretary of embassy or legation, consul general, consul, vice consul, or consular agent of the United States, or a diplomatic or consular official of the foreign country assigned or accredited to the United States. If reasonable opportunity has been given to all parties to investigate the authenticity and accuracy of the documents, the court may, for good cause shown:~~

- ~~(i) admit an attested copy without final certification; or~~
- ~~(ii) permit the foreign official record to be evidenced by an attested summary with or without a final certification.~~

~~**(B) Lack of record.**—A written statement that after diligent search no record or entry of a specified tenor is found to exist in the records designated by the statement, attested as provided in subdivision (A)(1) of this rule in the case of a domestic record, or complying with the requirements of subdivision (A)(2) of this rule for a summary in the case of a foreign record, is admissible as evidence that the records contain no such record or entry.~~

~~**(C) Other proof.**—This rule does not prevent the proof of official records or of entry or lack of entry therein by any other method authorized by law.~~

Rule 79. Special judge selection: circuit, superior, probate, municipal, and county courts

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(N) Place of Hearing.

- (1)** Absent the transfer of the case as set forth in Section (M), special judges are encouraged to employ procedures, such as the use of facsimile transmissions and telephone conferences that reduce the need for travel.
- (2)** A special judge may entertain motions and perform all administrative tasks and conferences with counsel in his or her own county.
- (3)** ~~However, all~~All hearings involving in-person testimony by witnesses shall be conducted in the court where the case is pending unless:
 - (a)** the parties and the judge agree otherwise on the record; or
 - (b)** the hearing is not before a jury and the special judge determines that exceptional circumstances exist such that the matter can only be heard in a timely fashion in his or her own county.
- (4)** All decisions, orders, and rulings shall be recorded promptly on the Chronological Case Summary and, when appropriate, the Record of Judgments and Orders of the court where the case is pending and shall be served in accordance with Trial Rule 72(D). It is

the duty of the special judge to effect the prompt execution of this rule. A court is deemed to have ruled at the time the ruling or decision is entered into a public record of or is received in the office of the clerk of the court where the case is pending.

- (5)** It is the duty of the judge of the court where the case is pending to assure the availability of facilities and staff for the special judge.

These amendments shall take effect January 1, 2004.

The Clerk of this Court is directed to forward a copy of this order to the clerk of each circuit court in the state of Indiana; Attorney General of Indiana; Legislative Services Agency and its Office of Code Revision; Administrator, Indiana Supreme Court; Administrator, Indiana Court of Appeals; Administrator, Indiana Tax Court; Public Defender of Indiana; Prosecuting Attorney's Council; Indiana Supreme Court Disciplinary Commission; Indiana Supreme Court Commission for Continuing Legal Education; Indiana Board of Law Examiners; Indiana Judicial Center; Division of State Court Administration; Indiana Judges and Lawyers Assistance Program; the libraries of all law schools in this state; the Michie Company; and the West Group.

The West Group is directed to publish this Order in the advance sheets of this Court.

The Clerks of the Circuit Courts are directed to bring this Order to the attention of all judges within their respective counties and to post this Order for examination by the Bar and general public.

DONE at Indianapolis, Indiana, this _____ day of July, 2003.

Acting Chief Justice of Indiana

All Justices concur.